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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

B.I.P. CORPORATION, Plaintiff, vs. MITEC TELECOM, INC., AND DOES 1 TO 30, Defendant.	Case No. 08 CV 0313 H CAB **DEFENDANT MITEC TELECOM, INC.'S MOTION TO DISMISS** Date: May 19, 2008 Time: 10:30 a.m. Place: Courtroom 13 Complaint Filed: January 18, 2008 Trial Date: None Set

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I. INTRODUCTION

In an effort to fit a square peg in a round hole, Plaintiff has crafted a complaint with defective causes of action ill-suited to the facts alleged. Without properly alleging the existence of a trade secret, Plaintiff is accusing Mitec of misappropriating its customer list, which was allegedly freely given to Mitec by Plaintiff without the parties executing a confidentiality or non-disclosure agreement. Because Plaintiff cannot allege the existence of a trade secret, its cause of action for intentional interference with prospective economic advantage fails as well.

Plaintiff is also trying to turn a defective product case into a fraud case. Without identifying any facts with particularity, Plaintiff is impermissibly accusing Mitec of fraud and deceit.

Finally, Plaintiff tries to allege the tort of breach of covenant of good faith and fair dealing. As explained below, Plaintiff cannot even allege the existence of a valid contract between the parties. Equally important, outside the special relationship of an insurer and its insured, California law does not recognize breach of the covenant of good faith and fair dealing as a valid theory for recovery.

For these reasons, as explained in greater detail below, Plaintiff's Complaint must be dismissed.

II. FACTUAL BACKGROUND

According to Plaintiff's complaint, Mitec is a manufacturer and primary supplier of telecommunications equipment, which Plaintiff sold. Compl., ¶ 5. On October 24th, 2006, the parties met in San Marcos wherein they negotiated the sale of telecommunications equipment. Compl., ¶ 6. That same day, the parties allegedly entered into an "oral agreement" wherein Mitec agreed to (1) sell telecommunications equipment to Plaintiff; (2) set aside warehouse space in Canada wherein it would store BIP's telecommunications products; and (3) ship product to Plaintiff as needed by Plaintiff or Plaintiff's customers. Mitec allegedly agreed to provide each product in working condition, free of defects, and warranted for at least two years. Compl., ¶ 7.

In 2007, Plaintiff purchased over $5 million worth of telecommunications equipment from Mitec for resale to its customers. Compl., ¶ 8. On January 8, 2007, Mitec's vice-president of sales met with Defendant in San Marcos wherein he allegedly admitted that the product delivered had defective power supplies. Compl., ¶ 9. Five months later, Plaintiff requested that Defendant recall all products, test all products, and ensure that they were free from defects. Compl., ¶ 10. Mitec assured Plaintiff that the products were indeed tested, repaired, and returned to the warehouse space. Compl., ¶ 10.

In June 2007, Plaintiff requested that the products in the warehouse be shipped to San Marcos. Compl., ¶ 11. According to Plaintiff, the products would have been worth $2 million if they were in good working condition. Compl., ¶ 12.

Meanwhile, Plaintiff contends that it was in possession of a customer list identifying those customers that regularly purchased telecommunications equipment from Plaintiff. Compl., ¶ 13. In May 2007, Mitec requested a copy of the customer list on the promise that it would use the list to ensure that it did not compete with Plaintiff. Compl., ¶ 15. In July 2007, Mitec started soliciting Plaintiff's customers by offering the same telecommunications equipment and cancelling all warranties on any equipment purchased from Plaintiff. Compl., ¶ 17.

Based on the foregoing, Plaintiff alleges causes of action for (1) misappropriation of trade secrets, (2) fraud and deceit, (3) intentional interference with prospective economic advantage, (4) breach of the covenant of good faith and fair dealing. As explained in greater detail below, Plaintiff's complaint is defective and must be dismissed.

III. MEMORANDUM OF POINTS AND AUTHORITIES

A. Standards For Motion To Dismiss (FRCP 12(b)(6))

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissal is appropriate where "it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief." *Rutman Wine Co. v. E & J Gallo Winery*, 829 F.2d 729, 732 (9th Cir. 1987).[1] Although "all allegations of fact are taken as true and construed in the light most favorable" to the plaintiff, "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996); *K-Lath v. Davis Wire Corp.*, 15 F. Supp. 2d 952, 963 (C.D. Cal. 1998); *see also Display Research Laboratories, Inc., et al., v. Telegen Corp.*, 133 F. Supp. 2d 1170, 1176, 2001 U.S. Dist. LEXIS 4710 (N.D. Cal. 2001). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990); *see also NTN Communications, Inc. v. Interactive Network, Inc.*, 1995 U.S. Dist. LEXIS 20322 at * 4 (N.D. Cal. 1995) (same).

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[1] The manner and details of pleading in the federal court are governed by the Federal Rules of Civil Procedure regardless of the substantive law to be applied in a particular action. *See* F.R.C.P. 1; *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965) (the Federal Rules govern issues concerning the adequacy of the pleadings). In diversity actions, California substantive law is applied to determine the validity of the plaintiff's claims. *See Erie R.R. Co. v. Thompkins*, 304 U.S. 64, 58 S.Ct. 817, 82. L.Ed. 1188 (1938).

B. Plaintiff's First Cause Of Action For Misappropriation Of Trade Secrets Fails To State A Valid Cause Of Action.

To state a cause of action for misappropriation of trade secrets under the Uniform Trade Secrets Act ("UTSA"), plaintiff must plead two primary elements: (1) the existence of a trade secret, and (2) misappropriation of the trade secret. See Cal. Civ. Code § 3426.1(b).

Dismissal is warranted where Plaintiff's allegations amount to pleading the legal conclusion of trade secret misappropriation. *See, e.g., Display Research Laboratories, Inc. v. Telegen Corp.*, 133 F. Supp. 2d 1170, 1176 (N.D. Cal. 2001) (dismissing a Lanham Act claim based on similarly conclusory allegations lacking factual support). In *Display Research*, the court rejected the only factual allegation supporting plaintiff's assertion that defendant had misrepresented the origin of work as "too generic." In dismissing the claim, the court stated: "conclusory allegations are insufficient to state a claim for purposes of a Rule 12(b)(6) motion." *Id. See also In re Delorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir. 1992) (pleading standard "requires more than the bare assertion of legal conclusions").

Here, Plaintiff alleges no more than conclusory assertions. While Plaintiff avers that its "customer list" was a trade secret, Plaintiff does not sufficiently allege *how or why* it should be considered a trade secret. Wholly missing from the allegations are any descriptions explaining how it protected its customer list from disclosure. While Plaintiff states that the list was only provided to "employees who needed the information," this information is itself insufficient and internally inconsistent with the balance of Plaintiff's allegations. It is *insufficient* because Plaintiff fails to describe how, if at all, it ensured that its employees would not disclose or provide the customer list to others. For example, there is no mention of a confidentiality or non-disclosure agreement mandating that employees maintain the confidentiality of the customer list.

The allegations are also *inconsistent* because Plaintiff later admits that it freely provided its alleged customer list to Mitec without requiring any executing a confidentiality or non-disclosure agreement. The admission that Plaintiff freely provided its alleged "trade secret" to another company expressly undermines its earlier allegation that it only provided the information *employees*.

"While a plaintiff is not required to plead *detailed* facts, she must plead *some* facts." *Pickern v. Pier I Imports,* 339 F. Supp. 2d 1081, 1088 (E.D. Cal. 2004) (emphasis in original); *DM Research Inc. v. College of American Pathologists,* 170 F.3d 53, 55 (1st Cir. 1999) (while the complaint need not provide evidentiary detail "the price of entry, even to discovery, is for plaintiff to allege a *factual* predicate concrete enough to warrant further proceedings, which may be costly and burdensome. Conclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition.") (emphasis in original).

Plaintiff's trade secret claim is based *entirely* on Plaintiff's unsupported and unwarranted conclusions that it possessed a valid trade secret. As one court has directed, courts need not "swallow the plaintiff's invective hook, line and sinker: bald assertions, unsupportable conclusions, periphrastic circumlocutions and the like need not be credited." *Aulson v. Blanchard,* 83 F.3d 1, 3 (1st Cir. 1996). Because Plaintiff failed to allege the existence of a trade secret, any misappropriation is not actionable, and Plaintiff's first cause of action must be dismissed.

C. Plaintiff's Second Cause Of Action For Fraud And Deceit Fails To State A Valid Cause Of Action.

Fraud is an *intentional* tort, the elements of which are a "false representation as to a material fact, knowledge of its falsity, intent to defraud, justifiable reliance and resulting damage." *Wilhelm v. Pray, Price, Williams & Russell*, 186 Cal. App. 3d 1324, 1331 (1986). Fraud is a "disfavored" action "involv[ing] a serious attack on character" and, as such, is subject to heightened and particularized pleading standards. *Allen v. Ramsay*, 179 Cal. App. 2d 843, 848 (1960); *see also Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal. 3d 197, 216 (Cal. 1983); *Conrad v. Bank of America,* 58 Cal. App. 4th 133, 156, 53 Cal. Rptr. 2d 336 (1996) ("fraud is a charge that is easily made but less often substantiated"). When pleading fraud claims in district court, a plaintiff must meet the requirements of Rule 9(b) of the Federal Rules of Civil Procedure, which states that, "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." F.R.C.P. 9(b). General pleading of the legal conclusion of fraud is insufficient. *See Von Grabe v. Sprint PCS*, 312 F. Supp. 2d 1285, 1305 (S.D. Cal. 2003) citing *Conrad*, 45 Cal. App. 4th at 156.

Likewise, under California law, each element of a claim for fraud, including the circumstances and nature of the misrepresentation, must be pleaded with particularity. California precedent unequivocally directs that these heightened pleading standards must be enforced. *See, e.g., Hall v. Department of Adoptions*, 47 Cal. App. 3d 898, 904 (1975) ("It is bad for courts to allow and lawyers to use vague but artful pleading of fraud simply to get a foot in the courtroom door."). As such,

> [T]he rule is everywhere followed that fraud must be specifically pleaded. The effect of this rule is twofold: (1) General pleading of the legal conclusion of "fraud" is insufficient; the facts constituting the fraud must be alleged; (2) every element of the cause of action for fraud must be alleged in the proper manner (i.e., factually and specifically), and the policy of liberal construction of the pleadings will not ordinarily be involved to sustain a pleading defective in any material respect.

Allen, 179 Cal. App. 2d at 848 (emphasis added).

When fraud is alleged against a corporate defendant, a plaintiff must allege the names of persons who made the fraudulent misrepresentations, their authority to speak, to whom they spoke, what they said or wrote, and what was said or written. *Lazar v. Superior Court*, 12 Cal.4th 631 (1996). *Every element* of a cause of action for fraud must be alleged in proper manner and *facts constituting* fraud must be alleged with specificity to allow the defendant to understand fully the nature of the charges made. *Roberts v. Ball, Hunt, Hart, Brown and Baerwitz*, 57 Cal. App. 3d 104 (1976).

In the present case, Plaintiff fails to plead fraud with any particularity. While Plaintiff complains that Mitec failed to provide products free of defects, failed to honor its warranties, and failed to maintain the confidentiality of Plaintiff's customer lists, wholly absent from Plaintiff's complaint is the name of the person who spoke, their authority to speak, to whom they spoke, what was said, and what was said or written. Without these requisite allegations, Plaintiff' fraud cause of action fails and must be dismissed.

D. Plaintiff's Third Cause Of Action For Intentional Interference With Prospective Economic Relations Fails To State A Valid Cause Of Action.

To assert an interference with prospective economic advantage claim, whether intentional or negligent, a plaintiff has the burden of pleading and proving that the defendant's interference was wrongful "by some measure beyond the fact of the interference itself." *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 11 Cal. 4th 376, 392-393 (1995); *National Medical Transportation Network v. Deloitte & Touche*, 62 Cal. App. 4th 412, 439-440 (1998). And, to state a claim for *negligent* interference with economic advantage, a plaintiff must also allege defendant owed plaintiff a duty of care in addition to the elements required to state a cause of action for intentional interference with economic advantage. *J'Aire Corp. v. Gregory*, 24 Cal.3d 799, 803-04 (1979);

Accuimage Diagnostics Corp v. Terarecon, Inc., 260 F.Supp.2d 941, 957 (N.D. Cal. 2003).[2] In the present case, Plaintiff's interference with prospective economic relations cause of action is predicated on Plaintiff's defective misappropriation of trade secrets claim. Because that cause of action fails, Plaintiffs interference cause of action fails as well and must be dismissed.

E. Plaintiff's Fourth Cause Of Action For Breach Of Covenant Of Good Faith And Fair Dealing Fails To State A Valid Cause Of Action.

Though the law implies a covenant of good faith and fair dealing in all contracts, see Rest.2d Contracts § 205, it does not give rise to a tort cause of action except in very limited cases not applicable here. *See Rogoff v. Grabowski*, 200 Cal. App. 3d 624, 628 (1988); *Freeman & Mills, Inc. v. Belcher Oil Co.*, 11 Cal. 4th 85, 102-103 (1995). Because the covenant is a contract term, compensation for breach of the covenant "has almost always been limited to contract rather than tort remedies." *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 684 (1988). The *Seaman's* court "cautioned against extending tort liability for breach of the implied covenant of good faith and fair dealing beyond parties with *special relationships* to ordinary commercial contracts" because, in ordinary commercial contracts, "'parties of roughly equal bargaining power are free to shape the contours of their agreement . . . . They may not be permitted to disclaim the covenant of good faith but they are free, within reasonable limits at least, to agree upon the standards by which application of the covenant is to be measured.'" *Rogoff v. Grabowski*, 200 Cal. App. 3d at 628-29 (citing *Seaman's*, 36 Cal. 3d at 759) (emphasis added). A limited exception to the general rule has developed "in the context of insurance contracts where, for a variety of policy reasons, courts have held that breach of the implied covenant will provide the basis for an action in tort." *Foley*, 47 Cal.3d at

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[2] Nowhere do Plaintiffs allege, nor could they allege, that Defendants owed a duty of care to Plaintiffs. Accordingly, Plaintiffs cannot sustain a cause of action for negligent interference with prospective economic advantage.

684; *see also Kransko v. Am. Empire Surplus Lines Ins. Co.*, 23 Cal. 4th 390, 400 (2000).

Accordingly, liability for breach of the covenant of good faith and fair dealing has been limited to the insurance context. *See, e.g., Hunter v. Up-Right Inc.*, 6 Cal. 4th 1174 (1993) (no cause of action for breach of covenant of good faith and fair dealing in context of employer/employee relationship); *Rogoff v. Grabowski*, 200 Cal. App. 3d 624 (1988) (no cause of action for breach of covenant of good faith and fair dealing—limousine rental service and customer); *Martin v. U-Haul Co. of Fresno*, 204 Cal.App.3d 396 (1988) (no "special relationship" exists); *Freeman & Mills, Inc. v. Belcher Oil Co.*, 11 Cal. 4th 85 (1995).

In the present case, Plaintiff did not even – and cannot – allege a breach of contract cause of action. California has codified the statute of frauds and provided, among others, the following rule: "An agreement that by its terms is not to be performed within a year from the making thereof" is invalid unless it or some note or memorandum is in writing and subscribed by the party to be charged. Cal. Civ. Code § 1624. The statute of frauds was designed to prevent fraud, and it demands that every material form of an agreement within its provisions be reduced to written form, whether the parties desire to do so or not. *Hansen Pac. Corp. v. Buck Mountain Logging Co.*, 191 Cal. App. 2d 826 (1961); *Ellis v. Klaff*, 96 Cal.App.2d 471 (1950).

In the present case, Plaintiff alleges the existence of an "oral contract" which provided for "(1) a 2 year warranty from defendant . . . on all products purchased by plaintiff and a 20 month warranty for product purchased and stored in plaintiff's cage prior to shipping. . . ." Pl.'s Compl., ¶ 70. From the complaint's own allegations, the alleged oral contract was contemplated to last through several years and several deals. Because this oral contract was never memorialized in any writing, any breach of contract cause of action is barred as is its cause of action for breach of the covenant of good faith and fair dealing.

IV. CONCLUSION

For the foregoing reasons, Mitec respectfully requests that the Court grant its motion to dismiss Plaintiff's complaint.

Dated: April 8, 2008

CALL, JENSEN & FERRELL
A Professional Corporation
SCOTT J. FERRELL
DAVID R. SUGDEN

By: */s/ David R. Sugden*
DAVID R. SUGDEN

Attorneys for Defendant Mitec Telecom, Inc.

CERTIFICATE OF SERVICE
(United States District Court)

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 610 Newport Center Drive, Suite 700, Newport Beach, CA 92660.

On April 8, 2008, I served the foregoing document described as **DEFENDANT MITEC TELECOM, INC.'S MOTION TO DISMISS** on the following person(s) in the manner(s) indicated below:

SEE ATTACHED SERVICE LIST

[X] (BY ELECTRONIC SERVICE) I am causing the document(s) to be served on the Filing User(s) through the Court's Electronic Filing System.

[ ] (BY MAIL) I am familiar with the practice of Call, Jensen & Ferrell for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business. On this date, a copy of said document was placed in a sealed envelope, with postage fully prepaid, addressed as set forth herein, and such envelope was placed for collection and mailing at Call, Jensen & Ferrell, Newport Beach, California, following ordinary business practices.

[ ] (BY OVERNIGHT SERVICE) I am familiar with the practice of Call, Jensen & Ferrell for collection and processing of correspondence for delivery by overnight courier. Correspondence so collected and processed is deposited in a box or other facility regularly maintained by the overnight service provider the same day in the ordinary course of business. On this date, a copy of said document was placed in a sealed envelope designated by the overnight service provider with delivery fees paid or provided for, addressed as set forth herein, and such envelope was placed for delivery by the overnight service provider at Call, Jensen & Ferrell, Newport Beach, California, following ordinary business practices.

[ ] (BY FACSIMILE TRANSMISSION) On this date, at the time indicated on the transmittal sheet, I transmitted from a facsimile transmission machine, which telephone number is (949) 717-3100, the document described above and a copy of this declaration to the person, and at the facsimile transmission telephone numbers, set forth herein. The above-described transmission was reported as complete and without error by a properly issued transmission report issued by the facsimile transmission machine upon which the said transmission was made immediately following the transmission.

[ ] (BY E-MAIL) I transmitted the foregoing document(s) by e-mail to the addressee(s) at the e-mail address(s) indicated.

[X] (FEDERAL) I declare that I am a member of the Bar and a registered Filing User for this District of the United States District Court.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this Certificate is executed on April 8, 2008, at Newport Beach, California.

*_/s/ David R. Sugden_*
David R. Sugden

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